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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 145

**TRUMAN GIBSON, JR.,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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Petitioner, Truman Gibson, Jr., respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California sentencing petitioner to two terms of five years imprisonment each, the sentences to be concurrent, and a fine of $10,000.00, and suspending the imposition of imprisonment only, and placing petitioner on probation for five years subject to the usual conditions and that the fine imposed be paid promptly.

## OPINIONS BELOW.

Trial in the District Court was by jury.

The opinion of the court below, not yet reported, is appended hereto as Appendix A.

The judgment of the court below is appended hereto as Appendix B.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is February 13, 1963.

2. Petition for rehearing, timely filed, was denied on March 19, 1963. On application of petitioner and other co-defendants, Mr. Justice Douglas granted an extension of time within which to file a petition for certiorari to and including May 18, 1963.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C., 1254(1).

## QUESTIONS PRESENTED FOR REVIEW.

1. Has a defendant been provided a fair trial where:

(a) He is denied an opportunity to show that there has been a systematic exclusion of Negroes from the trial jury;

(b) The judge refused even to consider his objections to irrelevant and incompetent testimony;

(c) Venue was never alleged;

(d) The judge did not apprise counsel of intended instructions prior to argument; refused to give proper instructions as to the effect of evidence of defendant's good character and prosecution's reliance on testimony it knew to be false and misleading;

(e) The judge permitted the prosecutor to make false, inflammatory and prejudicial statements concerning the defendant without even cautionary instructions and barred defense counsel from objecting to such statements;

(f) Over the objections of defendants, the judge admitted recorded conversations out of the presence of petitioner obtained by wire tapping and other surreptitious means, all aranged by local police officers as the prosecution well knew;

(g). Both the indictment and prosecution evidence included assertions of "underworld reputation" of other defendants and petitioner was compelled to answer, questions on cross examination concerning the "underworld" althqugh neither the prosecutor nor the judge ever defined the term?

2. May a conviction for conspiracy stand where, as to a defendant admittedly engaged in lawful business activities, the conviction is based entirely on conversations of alleged co-conspirators out of the presence of the defendant?

3. Can a successor judge fairly rule on post-trial motions in a lengthy trial where the testimony is in sharp conflict so that the principal issues can be resolved only by determining the credibility of witnesses including defendants who have testified?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Involved are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; 18 U.S.C. §371; 18 U.S.C. §875(b); 18 U.S.C. §195; 18 U.S.C. §3239; and Rule 25, Federal Rules of Criminal Procedure. They are set out hereinafter as Appendix C except for 18 U.S.C. §3239 which is quoted in the argument.

## STATEMENT OF THE CASE.

Petitioner, with four other defendants, was charged and found guilty under the two conspiracy counts of the ten count indictment involved here. The other eight counts were charges of substantive offenses against some of the other defendants.

The prosecution relied mainly on the testimony of Leonard Blakely, or as he is designated throughout the record, Jackie Leonard, and his partner Donald Paul Nesseth. Much of the evidence is in sharp conflict in that the credibility of the prosecution witnesses is seriously in issue.

In contrast the testimony of the petitioner is, in the main, uncontradicted. Truman K. Gibson, Jr., is and has been for many years a resident of the City of Chicago, County of Cook, State of Illinois and a citizen of the State of Illinois and the United States (R. Tr. 4289).[1] He is married and the father of one child. Following his graduation from the University of Chicago Law School in 1935 he was admitted to the bar of the State of Illinois in the same year and he continues to be a member of that bar (R. Tr. 4289). From 1935 to 1940 he engaged in the practice of law in the City of Chicago. In 1940 he was appointed Assistant Civilian Aide to the Secretary of War and in 1941 was appointed Civilian Aide to the Secretary of War charged with the duty and responsibility of advising the Secretary of War and the Assistant Sec-

[1] Reference is to the Reporter's Transcript of Proceedings.

retary of War on matters concerning Negro troops and Negro civilian personnel of the War Department (R. Tr. 4290). He continued in that post until the conclusion of the war with Japan in 1945 and for those services he was awarded the Medal for Merit. Thereafter he resumed the practice of law in the City of Chicago (R. Tr. 4290).

In 1949 Mr. Gibson became associated as Secretary with the then newly formed International Boxing Club of New York and the International Boxing Club of Illinois (R. Tr. 4289-4290). The business of the International Boxing Clubs was the promotion of fights in arenas owned by those promotional companies or affiliated corporations, and arrangement for the presentation of televised boxing bouts on Wednesday and Friday nights in those arenas and others throughout the United States (R. Tr. 4290). The producer of the Friday night fights telecast over the National Broadcasting Company television and radio networks was the Maxon Advertising Agency, a New York corporation not otherwise affiliated with the International Boxing Clubs. Mr. Gibson had no interest in the Maxon Agency. The American Broadcasting Company telecast the Wednesday night fights which were produced by Lester M. Malitz, Inc., and neither Mr. Gibson nor the International Boxing Clubs or any of their affiliates owned any stock in that producing company (R. Tr. 4297).

Each of the television contracts was a 52 week contract except for years in which Christmas or New Year's Day fell on Wednesday or Friday (R. Tr. 4298). Thus IBC was responsible for putting on at least 102 and probably 104 main events for television each year. For each of the main events promoted directly by IBC, about half of the annual total, those companies also were obliged to arrange sup-

porting cards of from three to five bouts. In more than ten years of operation, IBC never failed to produce a fight to meet its television obligations and the outcome of no such fight was ever predetermined or "fixed" (R. Tr. 4766, 4780).

The production costs to the sponsors of the Wednesday night fights ran from seventy-five to eighty thousand dollars per week, and as high as one hundred fifteen thousand dollars per week to the sponsors of the Friday night fights (R. Tr. 4307-4308). The International Boxing Clubs received a weekly fee from each series of approximately twenty thousand dollars per week to cover their costs of operation and arrangements with local promoters and fighters. Each contestant in a main event was paid a minimum of four thousand dollars, and each fighter in a semifinal bout was paid fifteen hundred dollars (R. Tr. 4307-4308). On telecast bouts originating outside New York or Chicago, the promoter in whose club the bout was held would receive a minimum of four thousand dollars in addition to the amounts paid to the fighters (R. Tr. 4308). Amounts paid for world championship matches and other outstanding contests were determined by negotiation between IBC, the producers, sponsors and networks (R. Tr. 3873). Advances by IBC to fighters, managers and other promoters was a characteristic of the business. The total of such advances outstanding at any time ranged from one hundred and seventy-five thousand dollars to two hundred and seventy-five thousand dollars (R. Tr. 5288).

The producers had the power and authority to approve or reject the site of scheduled fights both because of financial and technical considerations arising from the feasibility of telecasting and the cost and availability of necessary telephone lines and television equipment. Basically, fights

had to be arranged roughly eight weeks in advance and it was the responsibility of IBC to provide a substitute if for any reason a scheduled fight could not be held. (R. Tr. 3877-3878). All fights scheduled had to be approved by the state commission of the state in which the fight was held (R. Tr. 4324).

The stock of the International Boxing Club of New York was wholly owned by the Madison Square Garden Corporation (R. Tr. 4291). The stock of the International Boxing Club of Illinois was owned by Mr. Arthur M. Wirtz and Mr. James D. Norris, Chicago businessmen and owners of the Chicago Stadium, or corporations that they owned and controlled (R. Tr. 4291). Mr. Gibson owned no stock in either of the International Boxing Clubs and except for a few shares of Madison Square Garden Corporation stock which he owned for about six months in 1948, he never owned stock in any company affiliated with either the International Boxing Clubs, Chicago Stadium Corporation or the Madison Square Garden Corporation (R. Tr. 4290-4291).

The affairs of the International Boxing Club of New York were under the direction of its Board of Directors consisting of four persons, General John Reed Kilpatrick, long-time President of Madison Square Garden Corporation, Ned Irish, Executive Vice-President of Madison Square Garden Corporation, Mr. James D. Norris and Mr. Gibson (R. Tr. 4305). In 1958, Mr. Norris was replaced on that board by Mr. Francis Heazell, treasurer of the Knights of Columbus (R. Tr. 4305).

The International Boxing Club of Illinois was under the direction of a board of directors consisting of Mr. Wirtz, Mr. Norris and Mr. Gibson (R. Tr. 4305).

Mr. Gibson ran the Wednesday night fights from Chicago arranging most of the matches for television himself and supervising a matchmaker who arranged the supporting cards, and he was responsible for overseeing the New York operation where there was a matchmaker, assistant matchmaker and a managing director (R. Tr. 4298). A single main event would necessitate consideration of at least four or six opponents and managers and discussions with and about them (R. Tr. 4300). In the course of arranging these bouts Mr. Gibson carried on from four to five hundred conversations per year with fight managers and promoters throughout the country, mostly by telephone. He maintained an office at Madison Square Garden in New York where he spent about four days per week, and another office in the Chicago Stadium (R. Tr. 4299).

In performance of his duties Mr. Gibson was directly responsible to each of these boards and he reported daily to Mr. Norris who was a member of both boards and to Mr. Irish, then executive vice-president of Madison Square Garden (R. Tr. 4307).

In 1958, when Mr. Norris had a heart attack and resigned as president of the two International Boxing Clubs, the boards of directors of the two parent companies, the Chicago Stadium Company and the Madison Square Garden Corporation named Mr. Gibson as president (R. Tr. 5290). At that time the board of Madison Square Garden Corporation was composed of General John Reed Kilpatrick, chairman; Mr. Arthur M. Wirtz, vice-chairman; Mr. Ned Irish; Mr. Francis Heazell, treasurer of the Knights of Columbus; Mr. Daniel R. Topping, president of the New York Yankees; Mr. J. Arthur Friedlund, secretary and counsel for the New York Yankees; Mr. William H. Burke, vice-pres-

ident, Chicago Stadium Corporation; and Mr. August Bush (R, Tr. 5291, 5300). The board of directors of the Chicago Stadium Corporation was composed of Mr. Arthur M. Wirtz; his son William; Mr. James D. Norris; and Mr. Charles E. Dwyer (R. Tr. 5292).

In the performance of his duties, Mr. Gibson was responsible to these boards of directors respectively and he was required to make, and did make, reports to these directors at regular intervals; monthly in the case of the Madison Square Garden Corporation which was listed on the New York Stock Exchange and was therefore obliged to hold regular monthly meetings, and more frequently to Mr. Norris and Mr. Wirtz in connection with the activities of the Chicago Stadium Corporation and the International Boxing Club of Illinois (R. Tr. 5293). The books and records of all of these enterprises were regularly kept in the ordinary course of business, were regularly audited and the auditors made regular reports to the several boards (R. Tr. 4306).

Throughout his association with these enterprises Mr. Gibson was a salaried employee with no proprietary interest in them (R. Tr. 5287). Similarly, he never had any interest in any fighter or managerial contract with any fighter (R. Tr. 4326).

In addition to his business activities with these firms, Mr. Gibson maintained a private law office in Chicago and served as a member of the board of directors of Supreme Life Insurance Company of Chicago, and on the boards of various other business, social and philanthropic organizations. It stands uncontradicted that his character and reputation for truth and veracity are excellent (R. Tr. 5147, 5282, 5303, 5311).

In connection with his activities with boxing promotions Mr. Gibson met and dealt with hundreds of fight managers, fighters, promoters, matchmakers, sports writers, and state boxing commission officials and employees throughout the United States. Among these were Jack Leonard who when Mr. Gibson first met him was Assistant matchmaker at the Hollywood Legion Stadium in Los Angeles (R. Tr. 4294). Leonard subsequently became matchmaker at the same club (R. Tr. 4294). Similarly Mr. Gibson met and dealt with Don Nesseth, manager of record of Don Jordan, and Jackie McCoy, himself once a fighter and later a second, assistant matchmaker, and co-manager with Don Nesseth of Don Jordan (R. Tr. 4477-4478). Under the law of California a licensed matchmaker was prohibited from serving as manager of a fighter, but McCoy did, and Leonard regularly engaged in negotiation of matches for Don Jordan (R. Tr. 4476).

The Hollywood Legion Stadium owned by the American Legion Post of that city had been a well-known and popular boxing club for many years operated by the Post (R. Tr. 4320). Early in 1958, however, financial difficulties led the Hollywood Legion Post to decide to abandon its promotion of boxing (R. Tr. 4313-4314). At that time Jack Leonard approached Mr. Gibson and urged him to arrange to have the promotional enterprises with which he was connected take over the operation of the Hollywood Legion Stadium. Mr. Gibson informed Leonard that he and his associates were not interested in the direct promotion of boxing in the Hollywood Legion Stadium but he arranged for a telecast origination from the Stadium in order to help alleviate the financial difficulties (R. Tr. 4314).

Reluctant to see this popular, much-publicized club lost to the sport of boxing, Mr. Gibson discussed the matter with George Parnassus, long-time matchmaker of the Olympic Boxing Club, another Los Angeles fight promoter, and William Daly a long-time fight manager and an official of the Boxing Managers Guild who had close personal and business contacts with Mr. Edward Underwood, Chairman of the Board of the Hollywood Legion Post (R. Tr. 4315-4318). Other discussions with Jack Leonard and representatives of the California Athletic Commission followed, and in October, 1958 the International Boxing Clubs agreed to advance $28,000 for a lease deposit of $25,000 on the Hollywood Legion Stadium and working capital to a corporation to be formed by Jack Leonard with all of the stock to be owned by him. In addition, George Parnassus advanced $10,000 (R. Tr. 4329). That organization, designated the Hollywood Boxing and Wrestling Club, began to promote boxing in the Stadium under Leonard's direction and supervision in November, 1958 (R. Tr. 4330).

It was understood that Leonard was to rely upon the advice and assistance of Parnassus in promotional activities, and in order to conserve the limited funds of the enterprise, no major expenditures were to be made without notice to Mr. Gibson, although his signature was not required on checks drawn on the bank account of the Hollywood Boxing and Wrestling Club (R. Tr. 4332-4333). The money advanced by IBC was to be repaid from the promoter's share of television originations from the Hollywood Legion Stadium.

Almost immediately the Hollywood Boxing and Wrestling Club encountered financial difficulties and Leonard became actively involved in controversy with Parnassus (R. Tr. 4370). By early 1959, the situation had become

acute. The Legion Post was threatening to terminate the lease on the premises for nonpayment of rent and cancellation of the performance bond of the club, required by the California Commission, was threatened (R. Tr. 4595-4596). Leonard's promises to pledge the stock of the club to secure the advances had not been kept. Parnassus demanded repayment of his advances. Mr. Gibson made numerous calls to Los Angeles and several trips there in an effort to bolster the flagging operation. He arranged for Leonard to borrow $10,000 from one Ladell Tucker to repay Parnassus; he persuaded the Hollywood Legion Post to provide collateral security for the required performance bond by Leonard and he initiated discussions looking to a business combination of the Olympic Boxing Club and the Hollywood Boxing and Wrestling Club with its principals, Cal and Eileen Eaton, and Mr. Jamie K. Smith, one of the members of the California Athletic Commission (R. Tr. 4600-4606). Similarly, he asked William Daly to go to Los Angeles in May, 1959, to investigate the operation of the Hollywood Boxing and Wrestling Club and to determine what actions, if any, could be taken to improve its operations (R. Tr. 4660). At the same time Mr. Gibson pressed Leonard and his attorney, Mr. Kenneth Lynch, to execute the necessary documents to evidence the debt of the Hollywood Boxing and Wrestling Club for advances and to pledge the stock of the club as security as had been promised (R. Tr. 4668).

In December, 1958 Leonard raised with Mr. Gibson the possibility of a telecast of a fight to be held in Porterville, California, in connection with a sports day affair being planned in that community (R. Tr. 4553). Gibson undertook to make necessary inquiries of the producer as to the feasibility of a Porterville origination on or about

April 15, 1959 (R. Tr. 4560). In January, 1959 Leonard and Gibson discussed Gaspar Ortega and one of the Moyers from Portland, Oregon as possible contestants. Leonard was to promote the fight as an individual. He was to receive the customary four thousand dollar minimum promoter's fee plus two thousand dollars from the local sponsoring group, or a total of six thousand dollars (R. Tr. 4561).

Early in February, 1959, Leonard called Mr. Gibson in New York to inquire about the proposed Porterville fight. Mr. Gibson told Leonard that an answer had not yet been received from Mr. Malitz, the producer. Leonard said he was anxious to get the matter settled so that he could get an advance of eighteen hundred dollars on the promoter's fee to pay Palermo money Leonard said he owed him (R. Tr. 4563-4567). Gibson told Leonard he could not arrange for an advance on a Wednesday night from New York because that series was run from Chicago. A few days later Leonard called Mr. Gibson in Chicago and he agreed to make the requested advance against the proposed Porterville fight, and he drew the requisite voucher for issuance of a check to Leonard in the desired amount (R. Tr. 4568-4573).

Two days later Leonard called Mr. Gibson in Miami, Florida to inquire about the check. Gibson told him he assumed that it had been mailed and that Leonard should receive it in a day or two. Leonard then asked Gibson to so inform Ogilvie, the Hollywood Boxing and Wrestling Club bookkeeper, and to authorize him to issue a check of that organization to Leonard so he could cover a bank overdraft and replace the money when the Chicago Stadium check arrived. Gibson did so (R. Tr. 4573-4575).

Subsequently, Malitz refused to approve the Porterville fight because of the costs and difficulties of arranging a telecast there (R. Tr. 3892-3893). Both Leonard and Nesseth were angry and dissatisfied when Malitz communicated his decision to them in mid-March, 1959 (R. Tr. 3894-3895).

Meanwhile, as early as August, 1956, Mr. Gibson had sought to arrange a bout for the world's welterweight championship to be telecast on the Friday night series in early December with one of the managers of the then welterweight champion, Virgil Akins (R. Tr. 4443). He was managed by Bernie Glickman of Chicago and Eddie Yawitz of St. Louis. No opponent had been selected nor had the site of the bout been determined and, of course, no contracts had been signed (R. Tr. 4443). In October, however, the Olympic Boxing Club promoted a welterweight bout between Gaspar Ortega and Don Jordan at Long Beach, California. With the approval of the California Athletic Commission the bout was billed as an elimination for the right to fight for the welterweight championship (R. Tr. 4454). Don Jordan was the winner and the day after the fight Mr. Gibson began negotiations with Leonard, Nesseth and McCoy for an Akins-Jordan fight for the championship to be held on December 5, 1958, in Los Angeles, under the promotion of the Olympic Boxing Club (R. Tr. 4453). In the course of that conference Leonard told Mr. Gibson that Palermo, one of the other defendants, said there would be no fight unless he, Palermo, got a part of the manager's share of Jordan's purse (R. Tr. 4473).

Mr. Gibson had known Palermo through his activities in the boxing business as manager of a number of fighters including several world's champions (R. Tr. 4364-4365).

Mr. Gibson informed Leonard, Nesseth and McCoy that Palermo had nothing to do with the matter and that if they wanted a championship fight for Jordan they could have it (R. Tr. 4473). Later the same day Mr. Gibson met with Leonard, his lawyer Lynch, one James Ogilvie, an employee of the Hollywood Legion Stadium, and Parnassus to complete their plans for Leonard's organization of the Hollywood Boxing and Wrestling Club (R. Tr. 4432).

Jordan fought Akins and won the title from him. Under the terms of the original contract for the first Akins-Jordan fight, Akins was promised a rematch in the event that he was the loser, with the site of the bout to be St. Louis, Akins' home town (R. Tr. 4352).

In January, 1959 Jordan fought one Alvaro Guttirez in a non-title match under the promotion of the Olympic Boxing Club (R. Tr. 4338). The bout was not telecast. The IBC had no contract with the promotion. About that time Mr. Gibson learned that Don Nesseth was threatening to refuse to go through with the return bout with Akins. Another conference in Los Angeles between Leonard, Nesseth, McCoy and Gibson ensued (R. Tr. 4347-4348). By dint of agreeing to pay the transportation for six persons from Los Angeles to St. Louis for Nesseth and to make an advance of $2,500, Mr. Gibson persuaded Nesseth and Leonard to perform on their promise of a return match for Akins with Jordan (R. Tr. 4352).

That return bout was finally held in St. Louis on April 25, 1959, under the promotion of Sam Muchnick (R. Tr. 4613). By this time, pursuant to a court order, the International Boxing Clubs of New York and Illinois had been severed. Mr. Gibson had become head of the Boxing Divi-

sion of the Chicago Stadium Corporation and had terminated his connections with the New York promotional activities. The Chicago Stadium Corporation had no connection with the second Akins-Jordan fight. It was telecast by arrangement of Madison Square Garden with which, by then, Mr. Gibson had no connection (R. Tr. 4613).

A few days later Mr. Gibson learned that fighters had not been paid transportation in connection with a telecast fight at the Hollywood Legion Stadium and that there was a report that Nesseth had entered into an agreement with one Cus D'Amato, under the terms of which Nesseth was turning control of his fighters over to D'Amato. D'Amato was, and is, the manager of Floyd Patterson, heavyweight champion of the world (R. Tr. 4622). Though Mr. D'Amato had been indebted to the International Boxing Clubs for advances in the amount of $26,000 for some years he had consistently refused to permit Patterson to fight under the promotion of the International Boxing Clubs. Mr. Gibson called Leonard long distance about these matters and made arrangements to meet with Nesseth to discuss the matter in Chicago on May 2, 1959. Nesseth did not keep that engagement. Instead, on May 3, 1959, Leonard and Nesseth called Mr. Gibson by telephone and told him that they were being threatened by Palermo who was in Los Angeles and asked Mr. Gibson to make Palermo leave Los Angeles. Mr. Gibson told them that he had no control over Palermo and if they were being threatened by anyone they should "run, not walk" to the nearest law enforcement officers (R. Tr. 4635-4641).

About ten days later Mr. Gibson was subpoenaed to appear before the California Athletic Commission to testify

with respect to these matters. He appeared and did so testify (R. Tr. 4673).

Similarly, after the indictment involved here was returned, Mr. Gibson made a statement of several hundred pages to the United States Attorney in the Southern District of California (R. Tr. 4673-4674). Likewise he appeared before the Kefauver Committtee of the United States Senate in December, 1960, and testified at length concerning his activities in the boxing business.

Mr. Gibson never knew, saw or heard of Joseph Sica or Louis Tom Dragna prior to the return of this indictment (R. Tr. 4678-4679). Mr. Gibson had met Frank Carbo shortly after Mr. Gibson became associated with International Boxing Clubs. Over an eight or nine year period he had talked to him on only a few occasions usually by telephone and had not talked to him at all from about the spring of 1958 until after the hearing before the California Athletic Commission in May of 1959. (R. Tr. 4755-4757).

Neville Advertising Agency, a corporation in which Mr. Gibson had no interest but which was affiliated with the International Boxing Clubs made payments of approximately $40,000 to Mrs. Carbo between 1954 to 1957. These payments were made at the direction of Mr. Norris but Mr. Gibson knew of them. Likewise similar payments were made to Jack Kearns, an old-time fight manager. The payments were made to avoid antagonizing managers and fighters friendly to Carbo or Kearns. The payments were duly recorded, taxes were deducted, and no effort was made to conceal the fact that they were made (R. Tr. 4763-4767).

Mr. Gibson never made any threats of any kind, economically or otherwise, to Jack Leonard, Don Nesseth or anyone else (R. Tr. 4679). He never personally profited from any part of the purses of Don Jordan or any other fighter (R. Tr. 4677). He discontinued his connection with the boxing business in the fall of 1960 when the Boxing Division of the Chicago Stadium Corporation was dissolved.

The trial in this cause commenced on February 21, 1961, and continued from day to day before Judge Tolin, to May 30, 1961, when the jury returned verdicts of guilty as to all defendants on all counts (Tr.[2] IV, 951, 961).

Post-trial motions for a new trial (Tr. IV, 968-972) and for judgment of acquittal (Tr. IV, 973-974) were filed on behalf of Mr. Gibson on June 2, 1961, and were set for hearing on July 20, 1961 (Tr. IV, 980). In addition to being based on matters involved in the conduct of the trial these motions incorporated by reference the earlier two motions to dismiss including the issues of the motion to dismiss which the court had refused to hear on February 20, 1961. In accordance with leave of court obtained, memorandum and points of authority in support of these motions were filed on June 26, 1961 (Tr. IV, 1088-1108).

On June 11, 1961, Judge Tolin passed away. On June 19, 1961, a supplemental motion for new trial was filed on behalf of Mr. Gibson based on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending post-trial motions (Tr. IV, 988-997).

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[2]Reference to the Transcript of Record of the Court.

On June 26, 1961, the Honorable George H. Boldt, United States District Judge for the Western District of Washington being generally assigned to sit in the Southern District of California was assigned this cause (Tr. IV, 1094). On July 24, 1961, Judge Boldt heard oral argument in support of the post-trial motions. On October 16, 1961, Judge Boldt denied the supplemental motion for new trial (Tr. IV, 1312-1314). On December 2, 1962, Judge Boldt imposed sentence (Tr. VI, 1500).

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

### I.

**The Court of Appeals has sanctioned so gross a departure by the District Court from the accepted and usual course of judicial proceedings as to require exercise of this Court's power of supervision to remedy the denial of a fair trial to petitioner.**

The record in this case is replete with actions by the trial court prejudicial to the petitioner. When taken together they amount to a gross denial of a fair trial to petitioner.

### A.

On behalf of Mr. Gibson a motion to quash the venire was made on the ground that he is a Negro and that there was a systematic exclusion of Negroes from the jury (R. Tr. 75). That motion was summarily overruled on the basis of what the trial judge said he knew the facts to be and defense counsel was denied even an opportunity to make an effort of proof with respect to the matter. Instead the court itself called two witnesses to testify with respect to the method used to secure the venire (R. Tr. 90-96). Later (R. Tr. 4342-4346), the judge made a further statement as to his observations concerning service by Negroes on juries in the district.

Discrimination against a race by barring or limiting citizens of that race from participation of jury service has long been onerous to American thought and the Constitution and laws of the United States, Title 18 U.S.C., §243; *Cassell v. State of Texas*, 339 U.S. 282 (1950), and cases

there cited. If was error to deny the offer of proof of systematic exclusion of Negroes from the venire. *Carter* v. *Texas*, 177 U.S. 442 (1900); *Goldsby* v. *Harpole*, 263 F. 2d 71 (C.A. 5th, 1959). The efforts by the judge himself to answer the motion to quash the venire were themselves improper. *Norris* v. *Alabama*, 294 U.S. 587, 588 (1935).

**B.**

At the outset of the trial the court instructed counsel that it would rather entertain a motion to strike at the close of the government's case than to pass on objections with respect to evidence offered as the trial proceeded (R. Tr. 412-413). Thereafter it is clear from the record that though from time to time objections were made on behalf of Mr. Gibson with respect to the relevancy of testimony or other evidence offered by the prosecution, the court did not consider the questions as to relevancy to this individual defendant. At the close of the prosecution's case a detailed motion to strike was filed on behalf of Mr. Gibson (R. Tr. 766). That motion was summarily denied despite the fact that the prosecution had not shown that Mr. Gibson was a party to the conspiracy charged. Indeed, it is doubtful that the court even considered the question seriously.

By that time there had been admitted into evidence over the objections of counsel for Mr. Gibson testimony with respect to conversations outside his presence, conduct of other defendants not before known to him, and even testimony of conversations between persons not parties to the suit, particularly a recording of a conversation between one William Daly alleged to be a co-conspirator and not indicted, and Jack Leonard. There never was any evidence presented to show that Daly was a co-conspirator.

There was evidence, however, that Leonard, wired for sound by the Los Angeles Police Department, had gone to a hotel room occupied by Daly and proceeded to make a conversation with him. This the prosecution relied upon to corroborate Leonard's testimony in part. As a result there was the ridiculous and prejudicial situation that out-of-court statements by a prosecution witness, not made in the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence to corroborate the testimony of a prosecution witness who not only was available but who in fact testified at great length.

Similarly, recordings obtained by wire-tapping and other recordings of conversations outside the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence over his objection. The prejudice and harm to Mr. Gibson of admitting such evidence is demonstrated by the fact that after it retired, the jury, from this enormous record, asked for no reading of testimony and for no exhibits but the three recordings.

We adopt the argument of other defense counsel with respect to the impropriety of the admission of these recordings. We respectfully urge upon this Court, however, that the method used by the trial court in ruling on the admissibility of evidence in this case where both conspiracy and substantive counts were at issue was particularly erroneous and prejudicial to Mr. Gibson and, if no other reason were present, would require review of the decision below.

C.

It has been uniformly held that the requisite venue must be both alleged and approved by the Government, because the Sixth Amendment to the Constitution of the United States guarantees to the accused the absolute right

to a public trial by an impartial jury of the state and district wherein the offense is alleged to have been committed. *United States* v. *Dean*, 246 F. 2d 335 (8th Cir.); *United States* v. *Provoo*, 215 F. 2d 531 (2nd Cir.). Under Article Third of the Constitution of the United States, the Congress has the authority to define the jurisdiction, including venue, of the inferior Federal courts. From time to time, the Congress has exercised this authority by adoption of venue statutes of general applicability and by the adoption of venue statutes applicable with respect to particular offenses.

One such statute is applicable here. That is 18 U.S.C. §3239. It provides:

> "Any defendant indicted under sections 875, 876 or 877 of this title, with respect to communications originating in the United States, shall, upon motion duly made, be entitled as of right to be tried in the district in which the matter mailed or otherwise transmitted was first set in motion, in the mails or in commerce between the States."

Though Count V purports to be under both Sections 371 and 875 of Title 18 U.S.C., the gravamen of the offense charged is violation of Section 875 because without that section and without the charge that there was an agreement of the defendants to violate that section, there could be no violation of Section 371 because there would be no agreement to violate a law of the United States. Accordingly, Mr. Gibson is a "defendant indicted under Section 875".

Section 3239 specifically provides to any such defendant the absolute right to be tried in the district in which the interstate communication "was first set in motion". Thus, application of the customary requirement that venue must be alleged by the Government and proved, when applied

to this case, necessarily means that the Government must allege the place in which the interstate communication "was first set in motion".

Even a casual examination of Count Five shows that it does not satisfy this statutory requirement. Instead, in paragraph 4 of Count Five the Government has alleged only that, "to effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California *and in other places.*" (Emphasis supplied) The same paragraph continues by specifying five telephone calls between defendants Palermo and Carbo and Leonard. There is no allegation with respect to any telephone call by Mr. Gibson. More significantly, there is no allegation as to either of the termini of such telephone calls. Indeed, there is not even an allegation that these telephone calls were interstate communications.

The court below ignored Section 3239. It simply relied upon its own prior decision, which is in conflict with the cases cited above, to justify a conclusion that venue need not be pleaded.

**D.**

Though requested so to do the court did not apprise counsel of the instructions to be given prior to final argument. This, despite the explicit requirement of Rule 30 of the Federal Rules of Criminal Procedure. See *Ross v. United States*, 180 F. 2d 160 (C.A. 6th, 1950). This failure on the part of the court substantially prejudiced Mr. Gibson. See *Ross v. United States*, supra, and *United States v. Crescent-Kelvan Co.*, 164 F. 2d 582, 589 (C.A. 3rd 1948).

With respect to the instructions actually given or refused the court's action was equally prejudicial to Mr.

Gibson. On his behalf, and it was not contradicted, substantial evidence was adduced as to his good character and excellent reputation for truth and veracity. It is clear that he was entitled to an instruction as to the effect of such evidence. Such an instruction was requested, Defendant Gibson's Instruction F, which is set forth verbatim in Appendix D hereto. The trial judge indicated that he would give that instruction. Instead, he made a series of statements with respect to this matter which are also set forth verbatim in Appendix D.

We respectfully submit that those remarks would not satisfy the requirements with respect to an instruction as to character evidence. The statements made by trial judge completely omitted informing the jury that "an established reputation for good character alone may create a reasonable doubt as to the defendant Gibson". This aspect of the matter is not only of prime importance but has long been recognized as the minimum to which a defendant of good character is entitled. See 4 Barron, Federal Practice & Procedure, 246 and *Johnson* v. *United States*, 269 F. 2d 72, 74-75 (C.A. 10th 1959). We respectfully submit that in a case such as this where the credibility of the principal prosecution witness is attacked and where a defendant takes the stand and testifies at considerable length, and is subjected to long arduous cross examination as was Mr. Gibson and where evidence of good character is uncontradicted, to deny to him an instruction fairly and correctly apprising the jury of the effect of such character evidence is to prejudice and harm Mr. Gibson to such an extent that the conviction should be set aside.

Defense counsel contended that the prosecution had offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in

material parts. It is well settled that if the prosecution so acts a conviction even based in part on such testimony cannot stand. See *Napue* v. *State of Illinois*, 360 U.S. 264 (1959), and cases there cited. At first when requested so to do the trial judge indicated that he would give such an instruction (R. Tr. 7434). Actually he refused so to do. Under these circumstances we respectfully submit Mr. Gibson was denied, to his prejudice, an instruction to which he had a right.

**E.**

We adopt the argument of counsel for other petitioners with respect to the use of the assertions of "underworld reputation" as to defendants Dragna and Sica. Obviously these assertions in the indictment and prosecution evidence were prejudicial to petitioner. Even worse was the fact that the trial judge permitted the prosecutor to cross examine petitioner about the "underworld" though the prosecutor flatly refused to define what he meant by the vague and indefinite term and refused to obey the court's order that he do so (R. Tr. 5023-5050). See *Lanzetta* v. *United States*, 306 U.S. 451 (1939).

Equally serious, on closing argument the trial judge emphatically forbade defense counsel to interrupt the prosecution even for the purpose of making objections (R. Tr. 6825-6826). On its rebuttal argument the prosecution raised for the first time, and argued at length, two matters which had not been referred to by the prosecution on its opening, though that had consumed more than seven hours, and had not been referred to by any defense counsel. When counsel for the petitioner, as to whom these matters referred, sought leave of court to reply, that leave was denied (R. Tr. 7588-7589).

Certainly the conduct of the prosecution contributed to the denial of a fair trial to Mr. Gibson. See: *Berger* v. *United States*, 295 U.S. 78, 88 (1935); *Marks* v. *United States*, 260 F. 2d 377, 383 (C.A. 10th 1958); *Ross* v. *United States*, 180 F. 2d 160 (C.A. 1960); *Pierce* v. *United States*, 86 F. 2d 949, 952 (C.A. 6th 1936).

**F.**

We adopt the arguments of counsel for other petitioners with respect to the use of recorded conversations obtained by wire tapping and by other surreptitious means. It is conceded that these means were arranged by Los Angeles Police officers and that the federal officers knew this to be the fact.

All over the country the bench, the bar, and the public are concerned with these invasions of privacy by electronic devices. In this case their use was particularly prejudicial in view of the fact that none of these recorded conversations was a conference to which this petitioner was a party.

**G.**

All of the above and foregoing matters taken together, we respectfully submit, constitute so gross a deviation and departure from the ordinary course of judicial procedure as to require review by this Court in order to provide a remedy to petitioner for the denial of a fair trial.

## II.

**The decision of the court below is so inconsistent with applicable decisions of this Court and the decisions of other Courts of Appeal with respect to the law of conspiracy as to require review of the decision below by this Court.**

It is fundamental that a charge of conspiracy cannot be sustained unless it is proved beyond a reasonable doubt that there was an agreement by the particular defendants to commit the specified offense against the United States. *Ingram* v. *United States*, 360 U.S. 672, 677-678 (1959); *Pereira* v. *United States*, 347 U.S. 1, 12 (1953); *Krulewitch* v. *United States*, 336 U.S. 440, 443-444, 452-458 (1949). *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943).

To demonstrate a conspiracy to commit a particular substantive offense the prosecution must prove beyond a reasonable doubt at least the extent of criminal intent which would have to have been shown to demonstrate the commission of the substantive offense itself. *Ingram* v. *United States*, supra.

Even if the prosecution proved beyond a reasonable doubt knowledge on the part of a defendant of wrongdoing by others or an agreement between others to commit an offense, that would not be sufficient to convict that defendant as a party to any such agreement. *Ingram* v. *United States*, supra; *Krulewitch* v *United States*, supra; *Goodman* v. *United States*, 128 F. 2d 854 (C.A 9th 1942); *United States* v. *Falcone*, 109 F. 2d 579 (C.A. 2d 1940); *Muyres* v. *United States*, 89 F. 2d 784 (C.A. 9th 1937).

The court below ignored those decisions. Moreover, it flatly refused to apply *Glasser* v. *U. S.*, 315 U.S. 60, 75 (1942), which prohibits the use of declarations of co-conspirators to prove an alleged illegal agreement. Indeed,

so far as this petitioner is concerned the court below went so far as to *imply* that a non-indicted co-conspirator spoke for this petitioner when there was no evidence whatsoever that he did so.

Under these circumstances we respectfully submit the writ of certiorari should issue to review the decision of the court below because it is grossly in conflict with the applicable decisions of this Court and the decisions of other courts of appeal.

## III.

**In construing and applying Rule 25 the court below has decided a question of federal law which has not been, but should be, settled by this Court.**

The late Honorable Ernest A. Tolin conducted all of the proceedings in this cause until the time of his death on or about June 11, 1961. At that time the verdict had been returned and post-trial motions for new trial and judgment of acquittal had been filed.

Thereafter Mr. Gibson, and other defendants, filed a supplemental motion for new trial on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending motions (Tr. 988). Those motions were all denied by the successor judge, the Honorable George H. Boldt, on October 16, 1961, (Tr. 1342). Rule 25 of the Federal Rules of Criminal Procedure provides for a successor judge, but "if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial". The determination by a successor judge that he can perform the duties required after a verdict is reviewable on appeal, *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 6th 1957).

We respectfully submit that the determination by Judge Boldt in this case was an abuse of sound judicial discretion because of the fact and circumstances of this trial particularly with respect to Mr. Gibson.

The trial in this case began on February 21, 1961, and there were hearings before the Court on more than sixty days prior to the verdicts. The Reporter's Transcript of Proceedings in this cause totals more than seventy-five hundred pages. In the course of the trial approximately ninety witnesses testified. Thirty-seven of these were offered by the prosecution on its direct case. More than thirty witnesses, including this defendant and three of the other defendants, testified for the defense. More than twenty witnesses were tendered by the prosecution in rebuttal. Approximately three hundred fifteen exhibits were marked and about three hundred of these were received in evidence.

Included among the exhibits admitted were a number of recordings of conversations alleged to have been had between various persons by telephone and otherwise. Mr. Gibson did not participate in any of these conversations. All of the recordings introduced by the prosecution were admitted over his objections. Six of these recordings were played in open court before the judge and jury. Three recordings offered by the prosecution including one not previously played were played for the jury in open court after it had retired to consider its verdicts. The playing of these recordings and the attendant proceedings both in and out of the presence of the jury took up at least twenty per cent of the time devoted to the trial. The Reporter's Transcript of Proceedings, however, contains no transcript of any of these recordings because it was the opinion of the trial judge that the reporter could not fairly transcribe from the reproduction of these record-

ings in the courtroom. Though what purported to be transcripts of some of the recordings were marked as exhibits, Judge Tolin refused to admit these purported transcripts in evidence in the absence of agreement by all counsel that such transcripts were correct. There was no such agreement.

No judgment had been entered in this cause by Judge Tolin prior to his death. Even more important, the post-verdict motions were pending. Those motions raised substantial and complex questions of both law and fact. Mr. Gibson contended that the evidence was not sufficient to support the verdicts as to him. There is a sharp conflict in the evidence in this cause with respect to Counts I and V of the indictment which are the only counts charging Mr. Gibson. In this connection it is significant that the court below reversed the conviction of Dragna, the only other defendant charged only in Counts I and V and reversed the conviction of Sica as to Count V.

Over repeated objections, prosecution evidence was admitted which had no application to Mr. Gibson and which was prejudicial and harmful to him. There is a substantial question as to the credibility of the principal witness for the prosecution, Leonard Blakely, alias Jack Leonard, and some of the matters derogatory to the credibility of this witness and another prosecution witness, Don Nesseth, were conceded and admitted by the prosecution. Even more important is the credibility of Mr. Gibson as a witness in light of the nature of the charges against him, the length and nature of his direct testimony and the cross examination of him, and the uncontradicted evidence of his good character. It is respectfully submitted that one who has not observed the witnesses could not fairly resolve these issues.

The pending motions raised other issues which it is respectfully urged could not be fairly resolved by one who did not have the "feel of the case." These range from the sufficiency of the indictment, the question of venue and the propriety of a joint trial through, but not limited to, the legality of the method of jury selection, the propriety of innumerable rulings on the admissibility of evidence, the propriety of the conduct of the prosecution before and during the trial and particularly in closing argument, on to the sufficiency of the instructions given and refused.

More delicate and more difficult to state is a question which arises from the medical history of Judge Tolin. His untimely demise immediately following a long and arduous trial and his long history of serious cardiac difficulties with the inevitable attending necessity for medication and restricted activities suggests that though he was an able and experienced judge, in the conduct of this trial he may have been unable to proceed with the required fairness and impartiality. Review of his conduct of this trial under these circumstances by a successor judge, it is respectfully submitted, is not likely to serve the interests of justice when "manifestly, the judge to whom such a proceeding is assigned because of the death of the trial judge, finds himself in a position of considerable delicacy, as he has to perform the somewhat invidious function of reviewing the rulings of a judge of co-ordinate jurisdiction. * * *." (*Miller* v. *Pennsylvania Railroad Co.*, 161 F. Supp. 633, 636 (D.C.D.C. 1960).

Where there is a substantial conflict in the evidence and the credibility of prosecution witnesses is a serious issue, a successor judge cannot provide a fair trial to a defendant in passing on post-verdict motions and in rendering sentence. *Connelly* v. *United States*, 249 F. 2d 576, 580-581

(C.A. 8th, 1957); *Brennan* v. *Crisco*, 198 F. 2d 532, 533 (C.A.D.C., 1952); *Federal Deposit Ins. Corp.* v. *Siraco*, 174 F. 2d 360, 363-4 (C.A. 2d, 1949); *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (C.A. 2d, 1949); *Smith* v. *Dental Products Co.*, 168 F. 2d 516, 519 (C.A. 7th, 1948); *In re Linahan*, 138 F. 2d 650, 653-4 (C.A. 2d, 1943); 7 Moore Federal Practice (2d Ed. 1955) 1458.

This Court has only this term reiterated its view of the importance of demeanor in determining credibility of witnesses in *Townsend* v. *Sain*, No. 8, October Term, 1962, decided March 18, 1963, ..... U.S. ..... To the same effect is *Guzman* v. *Pichirilo*, 369 U.S. 698.

This Court has not hitherto construed or applied Rule 25 and we respectfully submit that this is a matter of such importance as to require this Court to give guidance to the lower federal courts in this important matter.

## CONCLUSION.

In light of all of the above and foregoing we respectfully request this Court to issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

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Dated: May 16, 1963.